

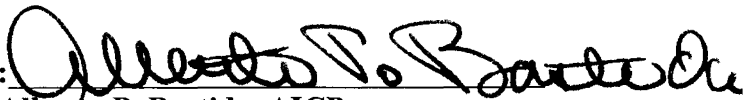
Government of the District of Columbia
OFFICE OF ZONING



Z.C. CASE NO.: 01-07C

As Secretary to the Zoning Commission, I hereby certify that on JUN 25 2002 copies of Z.C. Order No. 961 were mailed first class, postage prepaid or sent by inter-office government mail to the following:

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ZONING COMMISSION
District of Columbia
Case 01-01
ZONING COMMISSION
District of Columbia
EXHIBIT NO. 01-BY
EXHIBIT NO. 51

Government of the District of Columbia

ZONING COMMISSION



**ZONING COMMISSION ORDER NO. 961
CASE NO. 01-07C
(Consolidated Planned Unit Development and
Public Space Utilization Act Application for 1700-1730 K Street, N.W.)
January 14, 2002**

Pursuant to notice, the Zoning Commission for the District of Columbia ("Commission") held a public hearing on October 11, 2001, to consider applications from Commerce Building Associates and Riddell Building Joint Venture ("Applicant") for consolidated review and approval of a planned unit development, and review of an application for the use of public airspace above an adjacent public alley. The Commission considered the applications pursuant to chapters 24 and 30 of the D.C. Zoning Regulations, Title 11 of the District of Columbia Municipal Regulations ("DCMR"), and the Public Space Utilization Act, D.C. Code § 10-1121 (2001 Ed.). The public hearing was conducted in accordance with the provisions of 11 DCMR § 3022. For the reasons stated below, the Zoning Commission hereby approves the applications.

FINDINGS OF FACT

The Applications, Parties, and Hearing

1. On April 17, 2001, the Applicant filed applications for the consolidated review and approval of a planned unit development ("PUD") and use of public airspace for the property located at and public space adjacent to 1700 and 1730 K Street, N.W., Lots 56 and 851 in Square 126. The subject site is located in the C-4 District.
2. After proper notice, the Zoning Commission held a hearing on the applications on October 11, 2001. The parties to the case were the Applicant; Advisory Neighborhood Commission ("ANC") 2B, the ANC within which the property is located; and K.V. Sun Holdings, the owner of the Barr Building located adjacent to the subject property at 910 17th Street, N.W.
3. At its November 19, 2001, meeting the Zoning Commission deferred action on the applications to allow parties to submit additional information to the record. The Applicant submitted its supplemental information on November 27, 2001, and K.V. Sun Holdings submitted its response on December 5, 2001. The Zoning Commission took proposed action to approve with conditions the applications and plans that were presented

at the October 11, 2001, hearing and as supplemented by the drawings submitted to the record on October 31, 2001.

4. The proposed action of the Zoning Commission was referred to the National Capital Planning Commission ("NCPC") under the terms of the District of Columbia Self-Government and Governmental Reorganization Act. NCPC, by action dated January 10, 2002, found that the proposed PUD would neither affect the federal establishment or other federal interests in the National Capital, nor be inconsistent with the Comprehensive Plan for the National Capital. By action dated August 2, 2001, NCPC likewise found that the proposed use of public airspace would neither affect the identified federal interests nor be inconsistent with the Comprehensive Plan for the National Capital.
5. The Zoning Commission took final action to approve the applications on January 14, 2002.

The PUD Project

6. The subject site is presently improved with two 13-story commercial office buildings known as the Commerce Building at 1700 K Street, N.W. and the Riddell Building at 1730 K Street, N.W. The Applicant proposes to demolish both buildings and construct a new 12-story commercial office building with retail uses on the first floor. The new building will include a gross floor area of 370,891 square feet on private property and 2,244 square feet over public property, for a total gross floor area of 373,135 square feet.
7. The two existing buildings were constructed prior to the enactment of the current zoning restrictions on density and have a floor area ratio ("FAR") of 11.55. The new building will have a density of 11.08 FAR on private property.
8. The subject property is situated in Ward 2 at the intersection of Connecticut Avenue, K Street, and 17th Street, N.W., along the city's primary commercial office corridor. The irregular site occupies approximately 265 feet along K Street and approximately 120 feet along 17th Street, N.W. The site is located in the Connecticut Avenue and K Street area of the Central Employment Area under the Comprehensive Plan, which is characterized by high-density commercial structures.
9. Large office buildings with predominant heights of 130 feet are located to the east, west, north, and south of the site. The two buildings adjacent to the site at 1750 and 1776 K Street each consist of twelve stories at 130 feet in height. Across K Street to the north are the office buildings at 1000 Connecticut Avenue, N.W., and 1725 and 1775 K Street, N.W., all of which are constructed to heights of 130 feet. To the south of the site along 17th Street, N.W., the building height drops to 110 feet at the Barr Building, 910 17th

Street, N.W., but returns to a height of 130 feet at the Farragut Building at the corner of 17th and I Streets, N.W.

10. The C-4 District is designed for the downtown core that comprises the retail and office centers of the District of Columbia. The C-4 District permits a maximum height of 130 feet if the property abuts a street which is at least 110 feet wide, such as K Street. In addition, the C-4 District permits a maximum density of 10.0 FAR if a building can be built to a height of at least 110 feet. Under the PUD guidelines for the C-4 District, the density may be increased to 11.0 FAR. Also, a five percent (5%) increase beyond the maximum height or FAR permitted under the guidelines is allowed under § 2405.3 of the Zoning Regulations, provided that the increase is essential to the successful functioning of the project and is consistent with the purpose and evaluation standards of the PUD regulations.
11. Under the PUD guidelines, the site yields approximately 368,335 square feet of allowable commercial office space. In order to allow for the successful functioning of the PUD, a five percent (5%) increase in the allowable density would yield a total of approximately 386,752 square feet of commercial office space.
12. The proposed building reflects a design of superior architecture encouraged by the PUD regulations. The glass façade along K Street and the masonry treatment of the 17th Street elevation reflect the contrasting elements of public commerce and public parkland at the highly visible corner of Connecticut Avenue and K Street, N.W. The 17th Street façade is composed of large, proportioned windows framed by stone-clad lintels and piers. The façade is a palette of lightly colored and subtly variegated granite, highly reflective stainless-steel-clad mullions, and untinted low-reflectivity glass. The masonry screen continues above the top floor of the building and acts as an architectural embellishment in the overall design scheme. The K Street façade is treated with a more animated composition of metal and glass to reflect the commercial vibrancy of the streetscape. The design consists of oversized floor-to-ceiling windows within articulated colonettes. The expansive street wall is broken at the center by a vertical recessed bay, punctuated at the ground level by the main lobby entrance to the building and glass and metal marquee. The height of the building is stepped back five and one-half (5.5) feet at the twelfth floor along K Street.
13. The proposed building also includes special storefront treatments and landscaping elements along 17th and K Streets. The street level frontage along K Street is recessed five and one-half (5.5) feet to create a shallow arcade effect that mirrors the setback at the roofline. The retail frontage is designed as show windows wrapped in broad "detached" frames of polished stainless steel. The recessed arcade along K Street expands the sidewalk width by forty percent (40%). Dimension pavers will define the newly configured public space area beyond the building line. The number of trees will be increased from five (5) to six (6) along K Street, and from two (2) to four (4) along 17th

Street. Sidewalk benches and decorative trash receptacles designed to match the proposed building will also be provided along both street frontages.

14. The existing buildings on the subject site do not provide parking. The proposed building generates an off-street parking requirement of 155 spaces. The proposed structure will exceed this requirement and provide a minimum of 225 spaces. The provision of 225 spaces will address not only the parking needs associated with the proposed building but will also help offset the demand associated with the surrounding buildings, many of which do not include parking.
15. There will be loading berths at the rear of the proposed building with access from the public alley system in the square. The existing buildings currently do not provide loading facilities.
16. By virtue of a 1953 light and air easement granted by the Applicant to the owners of the Barr Building, the project includes an open court measuring approximately thirty (30) feet by five feet at the southeast area of the building. The court does not meet the minimum area requirements of § 776. The Commission finds, however, that the easement area provides adequate light and air to the Barr Building. The minimum area provided for this court will not impair the intent or purposes of the Zoning Regulations and will not have an adverse effect on adjacent properties. Accordingly, the court may be approved as designed pursuant to the Commission's authority under § 2405.5.
17. The following benefits and amenities will be created as a result of the PUD project:
 - a. *Urban Design and Architecture.* The proposed building has been designed to complement the surrounding large-scale commercial buildings as well as to respect its special public frontage across from Farragut Square. The dated appearance of the existing buildings and their obsolete mechanical and programmatic systems will be replaced with a modern, attractive design. The innovative architectural treatment of the proposed building will enhance and restore the visual prominence of this corner in the downtown commercial corridor. The PUD will provide high quality design features to reinforce the visual identity of the Central Employment Area.
 - b. *Special Value to the Neighborhood.* The Applicant will make a \$70,000 contribution to the Golden Triangle Business Improvement District ("BID"). The BID has earmarked the funds to assist in one or more ongoing projects with the National Park Service, specifically, to provide trash receptacles, benches, and landscaping for Farragut Square or Longfellow Park. This contribution targets an identified need of special value to the neighborhood and constitutes an important amenity of the project.

- c. *Local Business Opportunities.* The Applicant has executed a Memorandum of Understanding with the D.C. Local Business Opportunity Commission (LBOC) in order to achieve, at a minimum, the goal of thirty-five percent (35%) participation by small, local, and disadvantaged businesses in the contracted development costs in connection with the design, development, construction, maintenance, and security for the project. This memorandum contributes significantly to the District of Columbia goal of ensuring adequate opportunities for small and local businesses to participate in development projects throughout the city.
 - d. *First Source Employment Opportunities.* The Applicant has also executed a First Source Employment Agreement with the Department of Employment Services ("DOES") in order to achieve the goal of utilizing District residents for at least fifty-one percent (51%) of the new jobs created by the PUD project. The Applicant will use DOES as its first source for recruitment, referral, and placement of new hires for employees whose jobs are created by the PUD. The Applicant agreed to retain a service to monitor compliance with the Local Business Opportunity Commission Memorandum of Understanding and the First Source Employment Agreement and report periodically to the Office of Zoning on their efforts to comply with the employment goals of these agreements.
18. The PUD is consistent with the following elements of the Comprehensive Plan:
- a. *Housing Element.* The Applicant will assist in the substantial rehabilitation of a minimum of 12,369 square feet of low-income housing at the Trenton Park Apartment Complex, which will meet the needs of present and future residents of the District.
 - b. *Transportation Element.* Development of the project at the present site, within close proximity to the Farragut North and Farragut West Metrorail Stations and numerous Metrobus routes, will promote and stimulate the use of existing mass transit service. Additionally, the creation of a minimum of 225 new parking spaces on a site that does not currently provide parking will also help to reduce parking shortages in the downtown area.
 - c. *Urban Design Element.* The proposed PUD will enhance the large-scale commercial quality of the Connecticut Avenue and K Street segment of the Central Employment Area through design elements that respect the special character of this prominent commercial corridor. Further, the proposed project will provide a distinguished design that provides a rich and vibrant texture to this prominent corner and complements the vibrancy of the K Street commercial corridor.

- d. *Land Use Element.* The proposed project provides a high-density commercial office structure of high-quality design that will foster the continued growth of the District's economy and employment base and serve as a focal point for commercial Downtown.
 - e. *Ward 2 Element.* The PUD is consistent with the Ward 2 Plan goal of encouraging construction of additional office space in the Connecticut Avenue and K Street segment and other areas of the Central Employment Area.
 - f. *Generalized Land Use Maps.* The PUD is consistent with the Generalized Land Use Map, which depicts the project site as located in the high-density commercial land use category.
19. The proposed PUD deviates from the normal matter-of-right requirements of the Zoning Regulations as follows:
- a. The penthouse of the proposed PUD, which will be constructed to its maximum permitted height of eighteen and one-half (18.5) feet, will be set back only nine and one-third (9.33) feet at the rear elevation at the alley cul-de-sac. A setback equal to the height of the penthouse is required. It is necessary to locate the penthouse this distance from the rear building line in order to provide the most efficient interior elevator core and layout of space, while respecting the building height and sight lines along 17th and K Streets. By virtue of the public alley cul-de-sac at the rear, however, there is a substantial set back of more than thirty (30) feet from the adjoining property, which meets the spirit and intent of the regulations. Moreover, the penthouse will provide setbacks of more than thirty-five (35) feet at K Street and more than fifty (50) feet at 17th Street in deference to the building's public street frontages. These are approximately twice the required setback distances.
 - b. The proposed PUD also deviates from the rear yard provisions for buildings in the C-4 District. Under § 774.9(c) of the Zoning Regulations, a court may be provided in lieu of a rear yard for corner lots, such as the PUD site. In order to provide for enhanced features at the public frontages of the building, the Applicant will not be able to provide a court in lieu of rear yard at the service elevation of the new structure. The spirit of the regulations is nevertheless met by the ample light and air provided by the configuration of the rear alley area and the alley cul-de-sac.

Use of Public Airspace

20. Pursuant to the Public Space Utilization Act, the Applicant filed a request for the use of public airspace on April 17, 2001, with the Building and Land Regulation Administration

("BLRA") of the D.C. Department of Consumer and Regulatory Affairs. BLRA forwarded the application to the Zoning Commission on October 5, 2001, for a determination that the proposed use is permitted in such airspace and to establish regulations applicable to the use of such airspace "consistent with the [zoning] regulations applicable to the abutting privately owned property, including limitations and requirements respecting the height of any structure to be erected in such airspace, offstreet parking and floor area ratios applicable to such structure, and easements of light, air and access...." D.C. Code § 10-1121.04(2) (2001 Ed.).

21. A small portion of the new building will project over the public alley at the rear of the site. Beginning at the third floor level, the floor plate will increase by a depth of five and one-half (5.5) feet in a recessed area over the rear alley cul-de-sac. The expanded area will provide an additional 217.25 square feet of space on floors four through twelve. The floor plate will also increase slightly at the fourth floor and up over a small triangular piece of the alley, an area consisting of approximately seven and one-half (7.5) square feet, to fill out the corner of the building at the southwest portion of the site. The at-grade clearance will be approximately sixteen and one-half (16.5) feet, which exceeds the minimum required clearance height of fifteen (15) feet. The total area of airspace to be leased is 225 square feet over the two portions of the alley. The total gross floor area of the projections is 2,244 square feet, yielding a density of 9.97 FAR. The building in the area of the projections will achieve a height of 130 feet. Off-street parking for the projection will be provided at the same rate as for the office building.
22. The property surrounding the airspace is all located in the C-4 District. The portion of the building projecting into the airspace will be consistent with the C-4 District with respect to height, FAR, and off-street parking. No easements of light, air, or access are affected by the proposed use of airspace.
23. NCPC staff reviewed the application for use of public airspace at its Coordinating Committee meeting on July 11, 2001. The participating agencies at the committee meeting were NCPC, the D.C. Office of Planning, the D.C. Fire Department, the D.C. Department of Housing and Community Development, the D.C. Department of Public Works, the U.S. General Services Administration, the U.S. National Park Service, and the Washington Metropolitan Area Transit Authority. The committee forwarded the proposal to NCPC with the statement that the project had been coordinated with all participating agencies. On August 2, 2001, NCPC adopted its Executive Director's recommendation that the proposed lease of public airspace would neither affect the identified federal interest nor be inconsistent with the federal elements of the Comprehensive Plan for the National Capital.
24. In its letter dated October 5, 2001, referring the application to the Zoning Commission, BLRA recommended approval of the application. It stated that the application could be granted without adverse effects to the use, operation, and maintenance of any street or

alley. It further stated that the projections into airspace would not be used to deprive any real property not owned by the Applicant of light, air, or access.

Office of Planning Report

25. By report dated October 1, 2001, and through testimony presented at the public hearing, the Office of Planning ("OP") recommended approval of the application for use of public airspace and conditional approval of the PUD application. OP found that the proposed PUD is consistent with the Comprehensive Plan's Generalized Land Use Map designation of the area as one suitable for high-density commercial uses. OP further found that the proposal is consistent with the objectives and evaluations standards of a PUD. OP conditioned its recommendation on the submission of additional information from the Applicant concerning the design of the retail frontage along K Street, the enforceability and appropriate level of contribution to an affordable housing provider under the housing linkage requirements of the PUD regulations, and a contribution to the National Park Service or other organization for improvements to Farragut Square or the public areas surrounding the PUD site.
26. On October 10, 2001, the Applicant provided additional information to OP on the proposed contribution of \$70,000 to the Golden Triangle BID for improvements to the public areas surrounding the PUD site. Through a supplemental letter dated October 22, 2001, the BID further clarified that the funds would be earmarked for one or more projects in Farragut Square or Longfellow Park, including possible trash receptacles, benches, and landscaping.
27. OP was unable to make any determination on the proffered amenity of architecture and urban design in light of the generally high quality of office building design for prominent locations in the Central Employment Area under the matter of right provisions of the Zoning Regulations. Nevertheless, OP stated that the design was clearly superior, that a high level of attention had been given to architectural details and the quality of the materials, and that the building would make an excellent contribution to the appearance of a prominent corner of the central business district.
28. OP recognized the contribution to the Golden Triangle BID and the agreements with the LBOC and DOES as other amenities proffered by the Applicant. At the request of OP and the Zoning Commission, the Applicant provided additional information on their compliance history with LBOC and DOES agreements. The Applicant indicated that this project was their first experience with such agreements, but that one of its principals, through another company, had participated in such agreements for three projects in the District. By letter dated October 23, 2001, the principal stated that the company was in good faith compliance with the requirements of the LBOC and DOES programs.

ANC Report

29. By letter dated September 24, 2001, ANC 2B supported the PUD project and rental of public airspace. ANC 2B conditioned its support upon the Commission incorporating into its order a requirement that the Applicant contact and work with ANC 2B during the construction phase to mitigate construction impacts on pedestrian and vehicular traffic in the area. The Commission affords the views of the ANC the "great weight" to which they are entitled.

CONTESTED ISSUES

Housing Linkage Requirements

30. Under the provisions of § 2404, the Applicant is required to produce or financially assist in the production of dwellings or multiple dwellings that are affordable to low- and moderate-income people commensurate with the increase in office density achieved under the PUD process. The Zoning Regulations provide three methods for an applicant to meet the housing linkage requirements of § 2404: (i) actual housing construction or rehabilitation by the applicant; (ii) housing construction or rehabilitation through a business arrangement; or (iii) a contribution to housing trust fund. The first two methods calculate the amount of housing required on a square footage basis, whereas the third alternative is a cash contribution based on the increased value of the property as a result of the PUD process.
31. Steven E. Sher, Director of Land Use and Zoning Services, Holland & Knight LLP, was received as an expert in urban planning and testified on the project's compliance with this provision. Based on his testimony, the Commission finds that the matter of right office density under the C-4 District at this site is 318,108 square feet of space. The PUD project will consist of 352,971 square feet of gross floor area devoted to office use on private property and 2,244 square feet of office space on public property, for a total increase of 37,107 square feet of gross floor area devoted to office use.
32. The Applicant has chosen to enter into a business arrangement with Jubilee Enterprise of Greater Washington ("Jubilee Enterprise"), a non-profit housing provider, to produce the required amount of housing. Under the provisions of 11 DCMR § 2404.6(a)(2), the Applicant must produce a minimum of 12,369 square feet of housing within ANC 2B or a Housing Opportunity Area. The Applicant offered to contribute \$320,000 to Jubilee Enterprise to assist in the substantial rehabilitation of 16,673 square feet of housing, which comprises 21 units at the Trenton Park Apartment Complex. The apartment complex is located in Housing Opportunity Area 25 adjacent to the Wheeler Hills Estates.
33. Christopher N. Whitney, Executive Director of Jubilee Enterprise, and Robert O. Boulter, founding president of Jubilee Enterprise and a Board member of the Trenton Park

Neighborhood Corporation ("TPNC"), testified in support of the housing linkage contribution and described the financial arrangement for the affordable housing project. TPNC, a tenant association, currently holds title to the property and is unable to finance the significant rehabilitation costs associated with the complex on its own. Consequently, TPNC entered into an agreement with Banc of America Community Development Corporation ("BACDC") whereby the two groups formed a limited partnership that will acquire the property in December 2001. In forming the partnership, it was TPNC's goal to maintain a twenty (20) percent equity interest in the property. In order to achieve this goal, Jubilee Enterprise and TPNC determined that an additional \$320,000 was needed to supplement the existing capital reserves. Both Mr. Whitney and Mr. Boulter testified that no additional funding is needed for the substantial rehabilitation of these units; rather, the housing linkage contribution would be used to support local equity participation.

34. By letter dated October 10, 2001, BACDC confirmed the financial arrangement with TPNC and reiterated that no additional funding is needed to complete the project or fulfill the twenty percent (20%) equity interest of TPNC.
35. There was considerable debate between OP and the Applicant regarding the appropriate standard for measuring the adequacy of the required amount of housing. By reports dated October 1 and October 11, 2001, and through testimony at the public hearing, OP questioned whether the housing should be evaluated in terms of square footage alone. Although OP recognized that the Applicant was proceeding under the square footage calculations of § 2404.6(a)(2), it nevertheless asserted that this methodology must be considered as a dollar amount in order to determine its adequacy. Otherwise, OP reasoned, the Commission would have to rely on the statements of the Applicant and the housing provider as to whether the dollar contribution actually produced the required housing space.
36. OP sought and obtained the recommendation of the D.C. Department of Housing and Community Development ("DHCD") on the adequacy of the contribution. By report dated October 11, 2001, DHCD stated that it had reviewed the *pro forma* provided by BACDC and determined that the total rehabilitation cost for the property is \$10,066,090, excluding acquisition costs, or approximately \$41.06 per square foot of building. DHCD concluded that the Applicant would need to contribute \$520,470 in order to accomplish the rehabilitation of the required amount of housing. DHCD recommended that the Applicant increase its contribution to this total amount in order to be consistent with the housing linkage requirements under § 2404.6(a) of the PUD regulations. DHCD noted, however, that the housing project does meet the requirements of §§ 2404.6(d) and (e) of the regulations regarding "substantial rehabilitation" and maintenance of the units as affordable dwellings for a minimum of twenty years.
37. The Applicant, through its attorneys and expert witness in urban planning, contested the methodology employed by OP and DHCD for calculating the housing linkage

requirements. The Applicant argued that, by converting the square footage requirements to a dollar amount, OP and DHCD departed from the express language of the Zoning Regulations and the legislative intent of the housing linkage program. The legislative history of the housing linkage requirements, they claimed, demonstrated that in establishing the different methods for complying with the housing requirements of the Comprehensive Plan, the goal was to encourage actual housing construction rather than a cash contribution to a housing trust fund. To that end, the housing trust fund option set a very high contribution level based on the assessed value of the increased density achieved, so as to discourage cash contributions. The fear was that such funds could languish before being devoted to actual housing construction, according to the rationale set forth in Zoning Commission Order No. 795 that enacted the housing linkage text amendments, and comments received from the Downtown Cluster of Congregations on those amendments. Based on this legislative history, the Applicant concluded that evaluation of the production of housing should be directed to the amount of housing actually being produced and not the cost to produce that housing.

38. The Applicant further argued that the purpose of the housing linkage requirements was not to make unreasonable or excessive demands of the Applicant, but rather to ensure that housing production was commensurate with any additional density achieved under the PUD process. The Applicant referred to a letter dated March 8, 1996, from Chairman of the Council David Clark to the Zoning Commission on this matter, which stated that "the housing linkage concept is that if an applicant is going to get a little extra in the form of bonus office space in the District, the applicant ought to give a little extra in the form of more housing in the District." Therefore, the Applicant concluded that the PUD process should not be used to exact a broad range of concessions beyond what is explicitly required under the regulations. The Applicant further asserted that a thirty percent (30%) increase in square footage over the required amount—which translates to housing for an additional five (5) families at Trenton Park – should be considered a significant amenity of the PUD and an important benefit to the city as a whole.
39. At its November 19, 2001, meeting to take preliminary action on the case, the Commission found that the regulations lacked clarity and recommended that OP prepare text amendments to resolve the uncertainty. In the meantime, the Commission requested the Applicant to supplement the record to support their position.
40. By letter dated November 27, 2001, the Applicant submitted additional information to support its interpretation of the housing linkage requirements. The Applicant stated that the position advocated by OP constitutes a new interpretation of the housing linkage provisions and is contrary to the express language of the regulations. The Applicant argued that the statutory construction maxim *expressio unius est exclusio alterius* -- "the mention of one thing implies the exclusion of another" -- precludes the Zoning Commission from converting the required square footage amount under alternative § 2404.6(a)(2) to a dollar amount. The Applicant argued that because a dollar amount

was included in § 2404.7 for a contribution to a housing trust fund, but excluded from § 2404.6, the Zoning Commission could not re-interpret § 2404.6 to require a dollar contribution. In support of this argument, the Applicant relied on a decision from the D.C. Court of Appeals which noted that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *School Street Associates Limited Partnership v. District of Columbia*, 764 A.2d 798, 808 (D.C. 2001), quoting *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) and *Russello v. United States*, 464 U.S. 16, 23 (1983). Thus, the Applicant concluded, because the dollar amount formula is omitted from § 2404.6, it must be understood as an exclusion from that section.

41. The Applicant further argued that, contrary to OP's interpretation of the housing linkage provisions, § 2404.6 does not require an applicant to fund the entire amount of rehabilitation costs. In support of their position, the Applicant cited Zoning Commission Order No. 906 (Z.C. Case No. 98-14C) in the Solar Building PUD case. There, the applicant provided "gap financing" to assist in the construction of seven single-family affordable dwellings. The contribution did not fund the entire cost of construction and OP supported the concept of "gap financing." In finding number 64 of Z.C. Order No. 906, the Commission specifically found that "it [is] unreasonable to suggest that under the construction option, an applicant must pay the full cost of construction." The Applicant concluded that it is likewise unreasonable to suggest that under the rehabilitation option, an applicant must pay the full cost of rehabilitation.
42. Finally, the Applicant argued that the rehabilitation cost estimates provided by DHCD were overstated because they included hard and soft costs, such as builder profit, contingencies and other miscellaneous categories that are not legitimately attributable to rehabilitation. The Applicant provided an updated *pro forma* from Bank of America CDC, which calculated the construction cost for the rehabilitation of 245,147 square feet of space at \$7,160,561, or \$29.21 per square foot. The Applicant stated that if the Zoning Commission determined to re-interpret its regulations and require an applicant to fund the entire cost of rehabilitation, the Applicant in this case should only be required to contribute \$361,298.49 for 12,369 square feet of required housing. Any contribution over this amount, the Applicant argued, should be considered an amenity to the PUD.
43. At its December 10, 2001, meeting, the Commission again considered the merits of the instant case and the issues pertaining to the housing linkage requirements. The Commission reopened the record to receive an updated report from OP. OP stated that an agreement had been reached whereby the Applicant would voluntarily contribute \$520,470 to Jubilee Enterprise to assist in the rehabilitation of a minimum of 12,369 square feet. OP recommended that the Commission accept this amount as the fulfillment of the housing linkage requirement. OP further recommended that, if after further

consideration of the linkage policy, the Commission determined that a lesser amount would suffice, the PUD order could be modified accordingly.

44. The Commission finds that the Trenton Park Apartment Complex is located in Housing Priority Area 25 and that under the formula set forth in § 2404.6(a)(2), the Applicant is required to construct or rehabilitate 12,369 square feet of housing area. The Commission concurs in the finding of DHCD that the project meets the requirements of §§ 2404.6(d) and (e) of the regulations regarding "substantial rehabilitation" and maintenance of the units as affordable dwellings for a minimum of twenty years. The Commission finds that the contribution of \$520,470 to Jubilee Enterprise to assist in the rehabilitation of a minimum of 12,369 square feet of affordable housing at Trenton Park Apartment Complex satisfies the housing linkage requirements of § 2404.6(a)(2). The Commission further finds that this contribution may be reduced if the Commission determines, after further consideration of the housing linkage policy, a lesser dollar amount would suffice. In such instance, this PUD order may be modified accordingly without a hearing.

Projections Over Public Airspace

45. Under the Public Space Utilization Act, the Zoning Commission is to establish regulations for public airspace that are consistent with zoning regulations for the adjacent private property with respect to height, parking, FAR, light, air, and access. Because the property surrounding the airspace is located in the C-4 District, the use of public airspace must be consistent with that zoning category. Based on the Applicant's expert in urban planning, the projection generates a total density of 9.97 FAR (2,244 s.f. of gross floor area in public space divided by 225 s.f. of land area in public space). Accordingly, the Commission finds that this density is consistent with the 10.0 FAR limitation of the C-4 District. Likewise, the height of the projection falls within the 130-foot restriction. The expert noted that parking would be provided at the same rate as for the office building and that minimum clearances of fifteen (15) feet would be provided above the alley.
46. James Ingo Freed and Roy Barris of Pei Cobb Freed & Partners were recognized as experts in architecture. Their architectural plans and drawings, and other materials submitted to the record, show that the area of projection is located at the north side of an alley cul-de-sac, which measures approximately thirty-nine and one-half (39.5) feet wide by twenty-seven (27) feet deep. The proposed building will include a 5.5-foot projection into this cul-de-sac, and reduce the distance between the subject site and the adjacent Barr Building from twenty-seven (27) feet to twenty-one and one-half (21.5) feet. The projection was designed to assist with the successful functioning of the building. The "pinched" center portion of the site was expanded by five and one-half (5.5) feet to accommodate spatial configurations for floor plates, corridors, and tenant layouts that are consistent with current market demands. It also will allow for significant setbacks along the public frontage of K Street at the twelfth (12th) and ground floor levels to complement the building's prominent location at Connecticut Avenue and K Street, which will be

enjoyed by the public at large. Pedestrians will experience a wider sidewalk, retail shoppers will be protected from the elements, and the apparent height of the building will be reduced.

47. K.V. Sun Holdings, owner of the Barr Building, objected to the projection into public airspace. According to its representative, David Brooks, the Applicant did not demonstrate any exceptional circumstances that justified the projection or that the projection is necessary for the successful functioning of the building.
48. The Commission finds otherwise. Through supplemental information submitted to the record dated November 27, 2001, the Applicant demonstrated that the projections into public space achieve significant design improvements that are critical to the successful functioning of the building and that can be enjoyed by the public at large. First, the 5.5-foot projection into public space allows for setbacks at grade along the public frontage of K Street at the twelfth (12th) and ground floor levels to complement the building's prominent location, which can be enjoyed by the general public. Pedestrians will experience a wider sidewalk, retail shoppers will be protected from the elements, and the apparent height of the building will be reduced. The setback areas along K Street represent a "loss" of approximately 2,916 square feet of gross floor area to the Applicant whereas noted above, the public space projection represents a "gain" of approximately 2,172.5 square feet of gross floor area. The setback area and projection into public space are not adverse to the Barr Building and provide benefits to the public. Thus, in balancing the positive effect of the projection on the successful functioning of the PUD against the zero net impact to the Barr Building, it is clear that the projection can be approved as an appropriate design feature of the building that is consistent with the purpose and intent of the Zoning Regulations and the Public Space Utilization Act.
49. The Commission also finds that by expanding the "pinched" center portion of the irregular PUD site by five and one-half (5.5) feet, the project will accommodate enhanced spatial configurations for floor plates, corridors, and tenant layouts that are in conformance with current market demands. The Commission notes that when the existing buildings on the site were constructed, it was highly unusual for one tenant to lease an entire floor. Today, however, tenants often rent entire floors or multiple floors in one building. Consequently, it is imperative to create a floor plate as rectangular as possible to meet these current market standards and the projection into public space is critical to meeting this demand. Additionally, the Commission finds that the public space projection also allows the core of the building to be set back two column bays from the front of the building to create a special lobby area and far greater efficiency in the configurations of spatial layouts for full-floor and multi-floor tenants. This feature is likewise essential to the successful functioning of the design and circulation concept of the PUD.

50. By testimony at the public hearing and through supplemental submission dated December 5, 2001, Mr. Brooks stated his concern that the projection would impinge upon the light and air of the Barr Building. However, the sun angle diagrams prepared by Pei Cobb Freed show that the projection will have no impact on direct sunlight, and will actually increase the amount of primary reflected sunlight on the alley elevation of the Barr Building during the summer months. Only the Barr Building area adjacent to the fourth (4th) floor level of the PUD will experience a modest decrease in reflected light, and only during the spring and fall equinox. Moreover, the alley cul-de-sac area will still provide the greatest distance between the two structures. As shown on page A-6 of the architectural drawings dated September 2001, other portions of the two buildings are only separated by a distance of five (5) to ten (10) feet. Additionally, as pointed out in the Applicant's submission, the 21.5-foot separation is more than would be required for a side yard if one were provided for the Barr Building. According to the Applicant's calculations, at a height of 110 feet, the Barr Building would require a side yard of 18.3 feet, based on a width of two (2) inches for every foot of building height. Based on this evidence of record, the Commission finds that Mr. Brooks' concerns are unfounded and that the projection into airspace at the alley cul-de-sac will not impinge on the light and air of the Barr Building.

17th Street Façade

51. Finally, Mr. Brooks argued that the 17th Street façade would impair and mute the architectural features of the Barr Building, particularly with respect to the proposed decorative screen wall that projects above the twelfth (12th) floor level. He suggested that this element be stepped back, as is currently done on the buildings to either side of the Barr Building at 900 17th Street and 1700 K Street, N.W.
52. The testimony of the architects and submissions to the record, however, show that the 17th Street façade was carefully designed to complement its setting across from Farragut Square and its adjacency to the Gothic Revival Barr Building. The glass wall of K Street elevation has been carried over to the 17th Street façade with a masonry "screen" to respect the formal setting of the park. The shades and shadows of this elevation are designed to mimic the shades and shadows cast by the Gothic elements of the Barr Building. The architectural embellishment that extends above the twelfth (12th) floor serves to reduce the visibility of the mechanical penthouse. Moreover, based on the photo montage on page S-5 of the architectural drawings dated August 2001, Mr. Brooks' suggestion to step back this façade would not minimize upper stories or penthouses of the "bookend" buildings on either side of the Barr Building. The design as proposed for the PUD, on the other hand, as shown on page A-16 of the August 2001 drawings and the rendering at page A-32 of the October 2001 submission, will eliminate the visibility of roof structures from 17th Street, thereby enhancing the Washington skyline.

53. The Commission credits the testimony of the Applicant's experts in architecture and finds that the 17th Street façade is appropriately designed and does not impinge on the architectural character of the Barr Building. The Commission notes that the height of the 17th Street façade is consistent with the matter-of-right limitations of the C-4 District. The Commission finds that the penthouse setback of the new building will have less impact on the Barr Building than the existing penthouses of adjacent buildings. The Commission further finds that an additional setback at the twelfth (12th) floor level along 17th Street would disrupt the overall composition of the design. The Commission concludes that the design of the 17th Street façade and the building as a whole will enhance and restore the visual prominence of the Connecticut Avenue and K Street corridors, and constitutes an amenity of the PUD project.

CONCLUSIONS OF LAW

1. Pursuant to the Zoning Regulations, the PUD process is designed to encourage high-quality development that provides public benefits. 11 DCMR § 2400.1. The overall goal of the PUD process is to permit flexibility of development and other incentives, provided that the PUD project "offers a commendable number or quality of public benefits, and that it protects and advances the public health, safety, welfare and convenience." 11 DCMR § 2400.2.
2. Under the PUD process of the Zoning Regulations, the Zoning Commission has the authority to consider this application as a consolidated PUD. The Commission may impose development conditions, guidelines, and standards which may exceed or be less than the matter-of-right standards identified for height, FAR, lot occupancy, off-street parking and loading, or for yards and courts. The Zoning Commission may also approve uses that are permitted as special exceptions and would otherwise require approval by the Board of Zoning Adjustment.
3. The development of this PUD project carries out the purposes of chapter 24 of the Zoning Regulations to encourage the development of well-planned developments which will offer a variety of building types with more attractive and efficient overall planning and design, not achievable under matter of right development.
4. The proposed PUD site meets the minimum area requirements of § 2401.1 of the Zoning Regulations.
5. The PUD is within the applicable height and bulk standards of the Zoning Regulations, the increased density will not cause a significant adverse effect on any nearby properties and will, in fact, reduce the current density on the site. The project is a continuation of an appropriate use at an appropriate location in the heart of the Central Employment Area and is immediately proximate to mass transit. Accordingly, the project should be approved. The impact of the project on the surrounding area is not unacceptable. As set

- forth in the findings of fact, the 17th Street façade has been appropriately designed to respect the adjacent buildings, and the setbacks at the retail frontage and at the twelfth floor along K Street provide the dual benefit of enhancing the public streetscape and reducing the apparent height of the building. Further, the hard and softscape elements at the public frontages improve and enhance the visual quality of the public space and urban environment. The impact on housing is favorable because of the Applicant's proposed housing linkage measures.
6. The proposed application can be approved with conditions to ensure that the potential adverse effects on the surrounding area from the development will be mitigated.
 7. The project benefits and amenities, particularly the quality of the design of the building, are a reasonable trade-off for the density provided in the application, particularly given the high-density commercial nature of property in the immediate area. The subject development is both a K Street building and a 17th Street building, and the use, height, bulk, and design are appropriate for both sides and both contexts of the building.
 8. Approval of this PUD is appropriate because the proposed development is consistent with the present character of the area.
 9. Approval of this PUD is not inconsistent with the Comprehensive Plan.
 10. The Commission is required under D.C. Code § 1-261(d) (1999) to give great weight to the affected ANC's recommendation. The Commission has carefully considered the ANC's recommendation for approval and concurs in its recommendation.
 11. The Zoning Commission of the District of Columbia must determine the use and Zoning Regulations applicable to the use of airspace, consistent with zoning applicable to abutting privately-owned property, for individual applications as they are brought before this Commission. The standards for the Commission's approval are set forth in D.C. Code § 10-1121 (2001 Ed.), wherein Congress provided that the Commission must establish such regulations "consistent with the regulations applicable to the abutting privately owned property including limitations and requirements respecting the height of any structure to be erected in such airspace, off-street parking and floor area ratios applicable to such structure, and easements of light, air and access...."
 12. The Commission concludes that the phrase "structure to be erected in such airspace" includes the entirety of any structure of which a part is to be erected within airspace. The Commission has the authority to adopt regulations applicable to the airspace and the parcels assembled in conjunction therewith.
 13. The proposed use of airspace pursuant to the regulations which generally apply to the C-4 District, together with regulations which apply to the specific site, are reasonable.

14. Approval of the application for use of public airspace will be consistent with the purposes of the Zoning Act (52 Stat. 797) by furthering the general public welfare and serving to stabilize and improve the area.
15. The proposed application for use of public airspace can be approved with conditions that ensure the development will not have an adverse effect on the surrounding community.
16. The applications for a PUD and use of public airspace will promote the orderly development of the site in conformity with the entirety of the District of Columbia zone plan as embodied in the Zoning Regulations and Map of the District of Columbia.
17. The applications for a PUD and use of public airspace are subject to compliance with D.C. Law 2-38, the Human Rights Act of 1977.

DECISION

In consideration of the Findings of Fact and Conclusions of Law contained in this order, the Zoning Commission for the District of Columbia orders **APPROVAL** of the application for a PUD for the property located at 1700-1730 K Street, N.W., in Square 126, Lots 56 and 851; and **APPROVAL** of the application for the use of public airspace above the alley adjacent to Lots 56 and 851 in Square 126. This approval is subject to the following conditions:

1. The PUD shall be developed in accordance with the plans prepared by Pei Cobb Freed & Partners, dated August 2001, and as amended and supplemented by drawings dated September and October 2001, marked as Exhibits 4, 22-A, and 40-A in the record, as modified by the guidelines, conditions, and standards herein.
2. The project shall be a commercial office development consisting of approximately 370,981 square feet of gross floor area on private property and 2,244 square feet of gross floor area in the public airspace, for a total of 373,135 square feet of gross floor area. The PUD project shall neither exceed a density of 11.08 FAR on private property, nor exceed a density of 9.97 FAR in public space. The building shall not exceed a height of 130 feet, with setbacks as shown on the plans.
3. Landscaping and improvements to public space along the street elevations of the building shall be in accordance with the plans submitted to the record and subject to approval by the Public Space Committee.
4. The Applicant shall enter into a Contract Construction Agreement with Jubilee Enterprise of Greater Washington for the substantial rehabilitation of a minimum of 12,369 square feet of dwelling units at the Trenton Park Apartment Complex. No certificate of occupancy shall be issued for the PUD until a certificate of occupancy has been issued

for the requisite housing outlined in the Contract Construction Agreement. The Applicant shall pay \$520,470 to Jubilee Enterprise to fulfill the housing linkage requirement. If, after the further consideration of the PUD housing linkage policy by the Zoning Commission, it determines that (i) a lesser dollar amount is in keeping with the PUD housing linkage policy; and (ii) a lesser dollar amount will allow for the substantial rehabilitation of the required amount of housing linked to the subject PUD, this order shall be modified accordingly, without a public hearing, at the Applicant's request. Any difference between the amount paid by the Applicant and any reduced amount determined under the housing linkage policy may be refunded to the Applicant. The dollar amount shall not be increased.

5. The Applicant shall contribute \$70,000 to the Golden Triangle BID to assist in the improvements to Farragut Square or Longfellow Park, prior to the issuance of the building permit for the PUD.
6. The Applicant shall enter into a Memorandum of Understanding with the D.C. Local Business Opportunity Commission in order to achieve, at a minimum, the goal of thirty-five percent (35%) participation by local, small, and disadvantaged businesses in the contracted development costs in connection with the design, development, construction, maintenance and security for the project to be created as a result of the PUD project.
7. The Applicant shall enter into a First Source Employment Agreement with the Department of Employment Services (DOES) in order to achieve the goal of utilizing District of Columbia residents for at least fifty-one percent (51%) of the jobs created by the PUD project.
8. The Applicant shall retain a service to monitor compliance with the Local Business Opportunity Commission Memorandum of Understanding and the First Source Employment Agreement and shall report semi-annually to the Office of Zoning on their efforts to comply with the employment goals of these agreements upon project completion.
9. The Applicant shall have flexibility with the design of the PUD in the following areas:
 - a. To vary the location and design of all interior components, including partitions, structural slabs, doors, hallways, columns, stairways, and mechanical rooms, provided that the variations do not change the exterior configuration of the building;
 - b. To vary the number and location of parking spaces, not to decrease below the minimum of 225 spaces;

- c. To vary the final selection of the exterior materials within the color ranges and material types as proposed, based on availability at the time of construction; and
 - d. To make minor refinements to exterior details and dimensions, including belt courses, sills, bases, cornices, railings and trim, or any other changes to comply with the D.C. Building Code or that are otherwise necessary to obtain a final building permit. Only those exterior changes initiated by BLRA will be permitted within the context of this element of design flexibility.
10. The Applicant shall contact and work with ANC 2B during the construction phase to mitigate construction impacts on pedestrian and vehicular traffic in the area.
 11. No building permit shall be issued for this PUD until the Applicant has recorded a covenant in the land records of the District of Columbia, between the owners and the District of Columbia that is satisfactory to the Office of the Corporation Counsel and the Zoning Division of the Department of Consumer and Regulatory Affairs (DCRA). Such covenant shall bind the Applicant and all successors in title to construct on and use this property in accordance with this order or amendment thereof by the Zoning Commission.
 12. The Office of Zoning shall not release the record of this case to the Zoning Division of DCRA until the Applicant has filed a copy of the covenant with the records of the Zoning Commission.
 13. The PUD approved by the Zoning Commission shall be valid for a period of two (2) years from the effective date of this order. Within such time, an application must be filed for a building permit as specified in 11 DCMR § 2409.1. Construction shall begin within three (3) years of the effective date of this order.
 14. Pursuant to the Human Rights Act of 1977, D.C. Code § 1-2531 (1991), the Applicant is required to comply fully with the provisions of the Act, and this order is conditioned upon full compliance with those provisions. Nothing in this order shall be understood to require the Zoning Division of DCRA to approve permits if the Applicant fails to comply with any provision of the Human Rights Act.
 15. The airspace shall be developed and used in compliance with the use, height, floor area ratio, off-street parking, and all other provisions of the limitations and requirements pertaining to the C-4 District.
 16. The structure in the airspace and the connected structures on Lots 56 and 851 shall be deemed to constitute one building, and shall comply as such with the requirements of this order.
 17. A maximum density of 10.0 FAR may be used in the area of the alley.

18. All required parking and loading for the entire building shall be located on Lots 56 or 851.
19. No portion of the air rights structure shall be permitted within the first fifteen feet above the surface of the public alley.

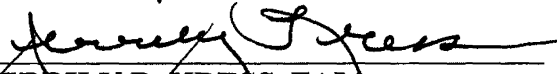
Vote of the Zoning Commission taken at its public meeting on December 10, 2001: by a vote of 4-0-1 (Carol J. Mitten, John G. Parsons, Anthony J. Hood, and Peter G. May to approve; James H. Hannaham not present, not voting).

The order was adopted by the Zoning Commission at its public meeting on January 14, 2002, by a vote of 5-0-0 (John G. Parsons, Anthony J. Hood, Carol J. Mitten, James H. Hannaham, and Peter G. May).

In accordance with the provisions of 11 DCMR § 3028, this order shall become final and effective upon publication in the *D.C. Register*; that is on JUN 28 2002.



CAROL J. MITTEN
Chairman, Zoning Commission



JERRILY R. KRESS, FAIA
Director, Office of Zoning